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No. 00-957

IN THE
Supreme Court of the United States

IN THE MATTER OF THE CARE AND TREATMENT
OF MICHAEL T. CRANE

STATE OF KANSAS,

Petitioner,

v.

MICHAEL T. CRANE,

Respondent.

REC'D TEAM 11
AUG 31 2001
UNSCANNED

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF KANSAS

REPLY BRIEF

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15 pp

QUESTION PRESENTED

Whether the Fourteenth Amendment's Due Process Clause requires a State to prove that a sexually violent predator "cannot control" his criminal sexual behavior before the State can civilly commit him for residential care and treatment?

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ARGUMENT

I. *KANSAS V. HENDRICKS* DID NOT CREATE A NEW "CANNOT CONTROL" REQUIREMENT IN THE CIVIL COMMITMENT CONTEXT, NOR IS A NEW DUE PROCESS STANDARD WARRANTED

With all due respect, respondent—and his *amici*—ignores this Court's long line of cases that emphasize two substantive, constitutional requirements for civil commitment: (1) a serious mental problem coupled with (2) dangerousness to self or others. *See, e.g., Seling v. Young*, 531 U.S. 250 (2001); *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Foucha v. Louisiana*, 504 U.S. 71 (1992); *Addington v. Texas*, 441 U.S. 418 (1979); *Humphrey v. Cady*, 405 U.S. 504 (1972). *Kansas v. Hendricks* very plainly reiterated and applied those two basic requirements in upholding the Kansas law at issue in this case against substantive due process challenges.[1]

The psychiatrists themselves recognize the limitations of their trade, but once again urge this Court, as they did in *Hendricks*, to constitutionalize a particular, debatable definition for those subject to involuntary civil commitment. Such efforts run contrary to the numerous statements in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) which recognizes the

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[1] Indeed, respondent chooses his words very carefully in his brief, more than once recognizing that cases such as *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270 (1940), involved a *statute* that itself required proof of utter or total lack of volitional control, or had been so interpreted by the state supreme court. *See, e.g.*, Brief for Respondent at 6, 7. As discussed more fully in the text above, the Kansas statute at issue here neither expressly includes such a requirement, nor has it been so construed by the Kansas Supreme Court. Indeed, the Kansas Supreme Court in this case expressly rejected any notion that the Kansas law includes such a requirement.

limitations of psychiatry.[2] Nonetheless, respondent and his *amici* press the argument that there is a constitutional requirement that the state prove "inability to control" behavior, even though the Court has never articulated such a due process requirement in any of its opinions and there is no consensus within the mental health community as to whether such a requirement is appropriate or, even if so, what it would mean.

Moreover, in arguments reminiscent of the challenges made (and rejected by this Court) in the *Hendricks* case itself, respondent and his *amici* contend that the Kansas law is punitive, criminal, and retributive. This contention is both erroneous on the merits and outside the scope of the question presented in this case. Respondent filed his own petition for a writ of *certiorari* in this case, raising *ex post facto*/ punishment issues, but this Court denied review. Respondent and his *amici* should not be permitted to bring through a back door issues that this Court turned away at the front door.

A. *Hendricks*, Like The Court's Previous Civil Commitment Decisions, Requires A Serious Mental Problem Coupled With Dangerousness

In his concurring opinion in *Kansas v. Hendricks*, Justice Kennedy observed that "[a]s all members of the Court seem to agree, then, the power of the state to confine persons who, by reason of mental disease or mental abnormality, constitute

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[2] *See, e.g., DSM-IV*, at xxi ("it must be admitted that no definition adequately specifies precise boundaries for the concept of 'mental disorder.'"); *id.* at xxiii ("a DSM-IV diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with the disorder"); *id.* at xxvii ("The clinical and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability determination, and competency.").

a real, continuing, and serious danger to society is well established." 521 U.S. at 372. That statement is an accurate summary of the principles this Court has established and reiterated in a long line of mental health cases. *See, e.g., Seling v. Young*, 531 U.S. 250 (2001); *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Foucha v. Louisiana*, 504 U.S. 71 (1992); *Addington v. Texas*, 441 U.S. 418 (1979); *Humphrey v. Cady*, 405 U.S. 504 (1972). As explained fully in Kansas's opening merits brief, nothing in this Court's decision in *Kansas v. Hendricks* deviated from those precedents.

Nor is respondent or his *amici* correct in arguing that this Court's decision in *Hendricks* was limited to the narrow, specific facts presented in that case. In essence, respondent and his *amici* are contending that this Court in *Hendricks* adopted a limiting construction of the Kansas law that the Kansas Supreme Court did not purport to adopt in that case, and in fact expressly rejected in this case.

But this Court has recently reiterated that federal courts generally are not free to provide limiting constructions of state statutes unless such a construction is reasonable and readily apparent. *Stenberg v. Carhart*, 530 U.S. 914, 944 (2000). And there is no plausible argument here that a limiting construction is either reasonable or readily apparent, since the Kansas Supreme Court itself expressly concluded that the Kansas law itself does *not* require a showing of uncontrollable dangerousness. *See* Pet. App. 8a.

Respondent and his *amici* (most of whom made these very same or similar arguments as *amici* supporting Mr. Hendricks in *Kansas v. Hendricks*) also contend that in *Hendricks* this Court only recognized deference to the States' choices regarding what constitutes "mental illness" in this context while apparently creating a rigid volitional impairment requirement. But the notion of volitional impairment and its relevance here is intertwined with the very concept of "mental illness." The two concepts are not necessarily separate and

distinct, and nothing in *Hendricks* suggests that the Court was giving deference to the States in only *portions* of their efforts to define "mental illness" for legal purposes. With due acknowledgement to Yogi Berra, this is *deja vu* all over again from *Kansas v. Hendricks*, when these very same *amici* unsuccessfully argued to the Court that there is a single definition of "mental illness" and they alone knew what it was.

Nor do respondent and his *amici* give any credit to the Court's following clear statement in *Hendricks*: "Those persons committed under the Act are, by definition, suffering from a 'mental abnormality' or a '*personality disorder*' that prevents them from exercising *adequate* control over their own behavior." 521 U.S. at 362 (emphasis added). The Court in *Hendricks* certainly was aware of the personality disorder alternative under the statute, and the Court also recognized that total or complete lack of volitional control is not a constitutional prerequisite to involuntary commitment for residential care and treatment.[3]

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[3] The National Association of Criminal Defense Lawyers, *et al.*, makes the completely unfounded suggestion that Kansas is using the Act "to target individuals who can control their impulses, subjects them to punitive confinement conditions and deprives them of access to treatment ...." Brief of the NACDL, *et al.*, at 15. There is no basis in the record in this case or elsewhere for the assertions that Kansas is "targeting" individuals who can control their impulses, subjecting anyone in the sex offender treatment program to "punitive confinement conditions" or depriving "them of access to treatment." Indeed, the Court in *Hendricks* rejected those very assertions, and respondent here does not himself make such unfounded allegations. Rather, as explained in note 6 below, respondent clearly has received meaningful treatment and recognizes that it has been of tremendous benefit to him.

B. Inability To Control Behavior Has Never Been The *Sole* Basis For Civil Commitment

Although perceived lack of volitional control has certainly been *one* basis for civil commitment, it has by no means ever been the *sole* basis, as respondent and his *amici* try to suggest.[4] Indeed, sources regarding eighteenth and nineteenth century mental health laws and practices uniformly indicate that the States enjoyed wide latitude in determining the bases for civil commitment.[5] The States certainly did not limit involuntary civil commitment to only those who were "utterly" or "totally" unable to control their behavior. And no eighteenth or nineteenth century court ever suggested that the Constitution so limited the States.

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[4] *See, e.g.*, W. Blackstone, Vol. 1, *Commentaries on the Law of England* *304 (1765) (involuntary commitment justified for "lunatics," "persons under frenzies," those "who lose their intellects by disease," and those "judged by the court of chancery incapable of conducting their own affairs"); A. Deutsch, *The Mentally Ill in America*, at 418-22 (1937) (discussing the variety of common law bases for involuntary commitment in the last quarter of the eighteenth century and first half of the nineteenth century); *id.* at 422 (discussing the case of Josiah Oakes in 1845 in which "Chief Justice Shaw ruled that restraint of the insane was justified not only by regard for public or personal safety, but by considerations of remedial treatment"); G. Grob, Mental Institutions in America: Social Policy to 1875 at 9 (1973) (variety of bases in colonial times).

[5] *See, e.g.*, G. Grob, *Mental Institutions in America: Social Policy to 1875*, at 3, 132 (indicating that mental hospitals in the nineteenth century cared for a variety of individuals, including those "whose behavior was deemed socially disruptive by the community", "abnormal", or who "because of behavioral problems [were] deemed dangerous to the security either of the family or of society"); A. Deutsch, *The Mentally Ill in America*, at 418-22 (discussing the variety of common law bases for involuntary commitment in the last quarter of the eighteenth century and first half of the nineteenth century).

C. A "Cannot Control" Requirement Would Be Impractical And Unworkable

As demonstrated in the State's opening brief, as well as the brief of the Association for the Treatment of Sexual Abusers, there is simply no basis in medical or scientific fact for actually determining whether a mentally disturbed sex offender "cannot control" his criminal sexual behavior. Virtually no one has complete and total lack of volitional control, even those who suffer from schizophrenia or serious psychoses. *See, e.g.,* Brief For The Association For The Treatment Of Sexual Abusers As *Amicus Curiae* In Support of Petitioner, in *Kansas v. Crane*, No. 00-957, at 3 (hereinafter "ATSA Brief") (quoting Christopher Slobogin, *An End To Insanity: Recasting The Role Of Mental Disability In Criminal Cases*, 86 Va. L. Rev. 1199, 1238 (2000) ("[A]s Morse and others have shown, even the most severely crazy people usually intend their acts and therefore have some control of them").

Indeed, many—if not most—diagnoses in the DSM-IV would fail to satisfy a "cannot control" test. *See, e.g., DSM-IV* at xxiii ("the fact that an individual's presentation meets the criteria for a DSM-IV diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with the disorder. Even when diminished control over one's behavior is a feature of the disorder, having the diagnosis in itself does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time.").

Although respondent's *amici* grudgingly acknowledge that proving the presence or absence of volitional control is

problematic,[6] they do not even attempt to address cases like Ted Bundy or Jeffrey Dahmer. That is a telling omission.

Volitional impairment is a feature of many mental problems and disorders, but even the most troubled people are rational and calculating, at least some of the time, if not much of the time. Indeed, some heinous sex offenders—like Bundy and Dahmer—certainly did not have complete "inability to control" their murderous behavior. Rather, they were quite cunning and calculating, and both of them managed to avoid detection and prosecution for some time. Thus, held to the Kansas Supreme Court's "cannot control" standard, it is likely that a state could not prove that even offenders such as those two should be subject to involuntary civil commitment for residential care and treatment.

D. Personality Disorders May Be Characterized By Lack Of Volitional Control

Even assuming the Court were to require some showing of volitional impairment as a prerequisite to involuntary civil commitment, *Hendricks* does not dictate an utter or total lack of control standard. Rather, the Court in *Hendricks* recognized that "[t]hose persons committed under the Act are, by definition, suffering from a 'mental abnormality' or a '*personality disorder*' that prevents them from exercising *adequate* control over their own behavior." 521 U.S. at 362 (emphasis added).

As explained in the State's opening brief, some personality disorders (including antisocial personality disorder), are

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[6] *See* Brief of the American Psychiatric Association, at 10 (acknowledging that "volitional impairment in general has not been subject to measurement or calibration across the spectrum of human behavior"); *id.* at 26-27 (same point, and also acknowledging that the APA has supported abandonment of volitional control notions in the context of the insanity defense).

characterized in some cases by impulsiveness and lack of control. *See* Brief of Kansas, at 20-24. The DSM-IV observes that "[i]ndividuals with these [personality] disorders often appear dramatic, emotional, or erratic. *DSM-IV*, at 630. Furthermore, the very first diagnostic criterion that DSM-IV sets out for personality disorders in general is as follows:

> A. An enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture. This pattern is manifested in two (or more) of the following areas:
>
> (1) cognition (*i.e.*, ways of perceiving and interpreting self, other people, and events)
>
> (2) affectivity (*i.e.*, the range, intensity, liability, and appropriateness of emotional response)
>
> (3) interpersonal functioning
>
> (4) *impulse control*

DSM-IV, at 633 (emphasis added).

In discussing Antisocial Personality Disorder in particular, the DSM-IV observes that

> Persons with this disorder disregard the wishes, rights, or feelings of others. They are frequently deceitful and manipulative in order to gain personal profit or pleasure (e.g., to obtain money, sex, or power). They may repeatedly lie, use an alias, con others, or malinger. *A pattern of impulsivity may be manifested by a failure to plan ahead.* Decisions are made on the spur of the moment, without forethought, and without consideration for the consequences to self or others . . . .

DSM-IV, at 646 (emphasis added). Indeed, the diagnostic criteria for this disorder include, as one of seven possibilities, "impulsivity or failure to plan ahead." *Id.* at 650.

Lastly, as also described in the State's opening brief, *id.* at 5, there is evidence in this case that respondent suffers at least some lack of volitional control, although not utter lack of control. Dr. Mabugat, the psychiatrist who evaluated respondent for purposes of this proceeding, was asked whether respondent "can't control his behavior, or won't control his behavior." J.A. 51. He responded unambiguously that "it's a combination thereof." *Id.* Thus, there is mental health evidence in this record indicating that respondent lacks at least some volitional control and also demonstrating that personality disorders can, at least in some cases, be characterized by such a lack of control.

II. THIS COURT ALREADY HAS REJECTED THE CONTENTION THAT THE KANSAS LAW IS RETRIBUTIVE, PUNITIVE OR CRIMINAL

In *Kansas v. Hendricks*, this Court unequivocally rejected the *ex post facto* and double jeopardy challenges to the Kansas law, concluding that the law is a legitimate effort to provide care and treatment to dangerous, mentally disturbed sex offenders. Respondent and his *amici* now attempt to persuade the Court to reconsider that holding, but this Court should reject the invitation for two reasons.

First, respondent filed his own petition for a writ of *certiorari* in this case, raising an *ex post facto*/punishment challenge. This Court denied review of that petition, and the question presented by the State's petition does not fairly encompass such issues.

Second, respondent and his *amici* miss the mark on the merits. The Kansas law is not retributive or punitive simply because treatment may be more or less effective with some sex offenders than with others. Nor is the law retributive or

punitive because some offenders subject to it may have some—or even considerable—ability to control their criminal behavior. Indeed, if those were the tests, the law is not retributive as applied to Crane. Crane himself appears to acknowledge benefitting substantially from the treatment he has received in the Kansas program, and apparently admits that the mental health *treatment* he has received has helped him *learn to control* his criminal sexual behavior.[7]

Rather, the important question is whether treatment is a legitimate goal of the Kansas law, *see Seling v. Young*, 531 U.S. 250 (2001), which this Court in *Hendricks* found to be the case. Moreover, Kansas seeks the involuntary commitment of very few of the sex offenders who are being released from prison. For example, Dr. Mabugat—the examining psychiatrist in this case—testified that, although Crane was approximately the tenth sex offender that the doctor evaluated for possible civil commitment, Crane was the first person whom the doctor found to meet the statutory requirements. J.A. 42-44. There is no evidence in the record

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[7] Respondent himself, in an interview he apparently gave shortly after the Court granted *certiorari* in this case, is quoted as praising the Kansas treatment program and acknowledging how it has benefitted him. *See Sexual-predator case has national implications*, Kansas City Star, B-1 (Apr. 10, 2001) ("I'm not hoping that this place [the treatment facility] gets shut down. I think the program is good."); *id.* at B-2 ("As much as I don't want it [this case] to be noteworthy, I want people to know that what I learned here [in the treatment facility] is equally as noteworthy.").

Moreover, the American Psychiatric Association once again, just as it did in the *Hendricks* case, argues that involuntary civil commitment must be limited to a *parens patriae* justification. Brief for the American Psychiatric Association, at 20-22. Even assuming that to be the case, a point which Kansas does not concede, Crane's own statements indicate the value he received from a treatment program in which he would never have engaged but for the Kansas law. Thus, intensive sex offender treatment in the Kansas program is "in the interest of the individual", the standard the APA asserts. *See APA Brief*, at 20-21.

in this case that Kansas or any other state is systematically using a sex offender civil commitment statute for deterrence, punishment or to circumvent the criminal process.

CONCLUSION

Kansas respectfully requests that the Court reverse the decision of the Kansas Supreme Court.

Respectfully submitted,

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